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Nos. 97-1184, 97-1243

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Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1309,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*

FEDERAL LABOR RELATIONS AUTHORITY,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE PETITIONER NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1309

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QUESTIONS PRESENTED

1. Whether the Federal Service Labor-Management Relations Statute (FSLMRS), 5 U.S.C. 7101-7135 (1994 and Supp. II 1996), obligates an agency to bargain over union-initiated midterm proposals, where the subject matter of the proposals is not covered by the term agreement, and the union has not waived its right to bargain.

2. Whether, in any event, the FSLMRS requires an agency to bargain over a contract provision that would obligate it to engage in negotiations, during the term of the agreement, over union-initiated proposals.

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OPINIONS BELOW

The opinion of the court of appeals (NFFE Pet. App. 1a-10a) is reported at 132 F.3d 157. The opinion of the Federal Labor Relations Authority (NFFE Pet. App. 11a-13a) is reported at 52 F.L.R.A. 475.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1997. The National Federation of Federal Employees filed a petition for a writ of certiorari on January 15, 1998, and the Federal Labor Relations Authority filed a petition for a writ of certiorari on January 28, 1998. Both petitions were granted on June 1, 1998, and the cases were consolidated. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101-7135 (1994 and Supp. II 1996), are reproduced at NFFE Pet. App. 24a-36a.

STATEMENT

A. The Federal Service Labor-Management Relations Statute

1. Title VII of the Civil Service Reform Act of 1978, commonly known as the Federal Service Labor-Management Relations Statute (FSLMRS or Statute), regulates labor relations in the federal government. The FSLMRS is the first statutory codification of labor relations in the federal service. *See Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 91 (1983) (*BATF*).[1] Congress explicitly found that "the right of employees to

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[1] Prior to enactment of the Statute, labor relations in the federal service were governed by a program established in 1962 by Exec. Order No. 10,988, 3 C.F.R. 521 (1959-1963 comp.). The Executive Order program was revised and continued by Exec. Order No. 11,491, 3 C.F.R. 861 (1966-1970 comp.), as amended by Exec. Orders Nos. 11,616, 11,636 and 11,861, 3 C.F.R. 605, 634, 957 (1971-1975 comp.). The various Executive Orders are reprinted in the *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, at 1211, 1244, 1268, 1272, 1336, 1341 (Comm. Print 1979) (hereinafter *Leg. Hist.*).

organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them . . . safeguards the public interest, . . . contributes to the effective conduct of public business, and . . . facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment . . . ." 5 U.S.C. 7101(a). Congress also stated that the Statute's provisions "should be interpreted in a manner consistent with the requirement of an effective and efficient Government." *Id.* at 7101(b).

2. Under the Statute, agency-employers are required to bargain in good faith with the elected exclusive representative of employees concerning conditions of employment. 5 U.S.C. 7116(a)(5). The term "conditions of employment" is defined broadly, and includes "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions," but does not extend to policies, practices, and matters relating to political activities or job classification, or to matters "specifically provided for by Federal statute." 5 U.S.C. 7103(a)(14). The FSLMRS further prescribes that labor and management have a "mutual obligation" to "meet at reasonable times" for the purpose of arriving at "collective bargaining agreements" concerning conditions of employment. 5 U.S.C. 7103(a)(12), 7114(a)(1).

The Statute's broad duty to bargain is subject to two expressly stated exceptions. First, the duty does not extend to proposals that are "inconsistent with any Federal law or any Government-wide rule or regulation" or with agency rules or regulations for which there is a "compelling need." 5 U.S.C. 7117(a)(1), (2). Second, the Statute excepts certain management rights from the obligation to bargain. 5 U.S.C. 7106(a). The enumerated management rights are "subject to subsection (b)" of Section 7106, which provides that an agency-employer must negotiate about "procedures" agency managers will

observe in exercising their authority and "appropriate arrangements" for employees who are adversely affected by management's exercise of its rights. 5 U.S.C. 7106 (b)(2), (3).

3. The Federal Labor Relations Authority (FLRA or the Authority) is an independent, three-member body created by the Statute to perform a role in federal government labor relations similar to that performed by the National Labor Relations Board in the private sector. *BATF*, 464 U.S. at 97. The Statute specifically assigns the FLRA the responsibility to determine whether particular bargaining proposals fall within the statutory duty to bargain. 5 U.S.C. 7105(a)(2)(E).

If the FLRA finds a proposal negotiable, the parties are required to bargain in good faith over its inclusion in a collective bargaining agreement. If negotiations reach impasse, "either party may request the Federal Service Impasses Panel to consider the matter" (5 U.S.C. 7119 (b)(1)) and "take whatever action is necessary and not inconsistent with [the Statute] to resolve the impasse" (*id.* at 7119(c)(5)(B)(iii)), including, where appropriate, requiring the parties to include a proposal in the contract. *See Veterans Admin. Med. Ctr., Tampa, Fla. v. FLRA*, 675 F.2d 260, 265 n.9 (11th Cir. 1982). When issuing such an order, the Federal Service Impasses Panel (Panel or FSIP) considers the reasonableness of any proposal at issue in determining what contract language will be imposed. *See id.*

B. The Proceedings in This Case and Relevant Prior Proceedings

1. Petitioner National Federation of Federal Employees, Local 1309 (NFFE or the Union), is the exclusive bargaining representative of certain employees of the United States Geological Survey of the Department of the Interior (the Survey). During negotiation of a collective bargaining agreement, the Union proposed that the Survey

agree that, during the term of the agreement, it would be obligated "to negotiate on negotiable matters not covered by the provisions of this agreement." NFFE Pet. App. 3a.

The Survey contended that the proposal was not within its duty to bargain. Pet. App. 3a-4a. In so contending, it relied upon the Fourth Circuit's rejection of a holding of the FLRA that the FSLMRS requires an agency to bargain over union-initiated midterm proposals. *Social Sec. Admin. v. FLRA*, 956 F.2d 1280 (4th Cir. 1992) (*SSA*).

The Union then commenced unfair labor practice proceedings before the FLRA. The Authority, relying on its previous decisions and the decision of the D.C. Circuit in *National Treasury Employees Union v. FLRA*, 810 F.2d 295 (D.C. Cir. 1987) (*NTEU*), held that the Survey had violated the Statute in refusing to negotiate. Pet. App. 11a-23a. The FLRA noted (*id.* at 17a) that it had previously rejected the Fourth Circuit's *SSA* decision. In addition, it distinguished *SSA* from this case because *SSA* had only held that there was no statutory obligation to bargain midterm; the court had not reached the issue of whether a union could negotiate for that right. *Id.* at 17a-18a.

2. The Survey petitioned for review in the Fourth Circuit, the Authority filed a cross-application for enforcement, and the Union intervened in support of the FLRA. The court granted the Survey's petition and denied the Authority's cross-application, finding the case controlled by its *SSA* ruling and its decision in *United States Department of Energy v. FLRA*, 106 F.3d 1158 (4th Cir. 1997) (*DOE*). Pet. App. 8a-10a.

a. In *SSA*, the Fourth Circuit held, directly in conflict with the D.C. Circuit's decision in *NTEU*, that the Statute imposes no obligation upon agencies to bargain midterm over union-initiated proposals. In reaching its decision that agencies may be required to bargain during the term of a collective bargaining agreement regarding subjects

not covered by the parties' agreement, the *NTEU* court had relied on the FSLMRS's text—including its "broad and unqualified" (810 F.2d at 299) definition of the term "collective bargaining agreement"—as well as the Statute's design and history and "basic principles of labor law" (*id.* at 301).

The Fourth Circuit's contrary *SSA* ruling stated that a "textual analysis" of the Statute did not yield a "definitive" answer to an agency's obligation to engage in midterm negotiations. 956 F.2d at 1284. But the court nonetheless determined that the FSLMRS "seemed" to "strongly suggest[]" that Congress contemplated that the duty to bargain in good faith would extend to "only one, basic agreement." *Id.* In reaching this conclusion, the court relied upon a passage in a Senate report that had accompanied a version of the Statute that did not become law. *See id.* at 1284-85.

Moreover, the *SSA* court took issue with the D.C. Circuit's reliance on well-settled private sector precedent recognizing a union's right to initiate midterm bargaining. *See id.* at 1286-88. Finally, the court's opinion contained an extended policy analysis of union-initiated midterm bargaining, and concluded that to permit such negotiations would contravene Congress' goal of achieving an effective and efficient government.

b. In *DOE*, the Fourth Circuit extended the rationale of *SSA*, determining that it actually precluded a federal agency even from negotiating over a contract provision that would permit union-initiated midterm bargaining. The FLRA had found the proposal negotiable, reasoning that *SSA* addressed only whether the Statute imposed on agencies an obligation to engage in union-initiated midterm bargaining, but left open whether a union could obtain such a right through bargaining. *United States Dep't of Energy, Washington, D.C. and AFGE Local 1995*, 51 F.L.R.A. 124, 127-28 (1995), *rev'd*, 106 F.3d 1158 (4th Cir. 1997).

The court of appeals found the FLRA's distinction unpersuasive on the grounds that midterm bargaining is at odds with the policies underlying the FSLMRS and is wholly contrary to congressional intent. *See DOE*, 106 F.3d at 1163. In addition, the court asserted that the FLRA's position would "vitiate *SSA*." *Id.* The court reasoned that because the FSIP followed the FLRA's precedent regarding midterm bargaining, the Panel would invariably impose midterm bargaining clauses on federal agencies and thus permit unions to "circumvent *SSA*." *Id.* at 1164.

c. In the present case, the court of appeals rejected the efforts of the FLRA and the intervenor Union to distinguish *SSA* and *DOE*, the rationales of which it found controlling. Pet. App. 8a-10a. The court thus found the Union's proposal nonnegotiable. *Id.*

SUMMARY OF ARGUMENT

As the D.C. Circuit pointed out in *NTEU*, Congress determined, in crafting the FSLMRS, that "collective bargaining contributes to stability in federal labor-management relations, and to effective and efficient government." 810 F.2d at 300. Indeed, Congress could not have been more explicit when it found that the right of employees to "bargain collectively" "safeguards the public interest" and "contributes to the effective conduct of public business." 5 U.S.C. 7101(a).

In the face of these congressional findings, the court below held that federal employers have no obligation to negotiate over a proposal that would have permitted union-initiated midterm bargaining. In so ruling, the Fourth Circuit pointed to its earlier decision in *SSA*, which concluded that federal employers have no obligation, under the FSLMRS, to negotiate over proposals initiated by a labor organization during the term of a collective bargaining agreement. The court also cited its *DOE* holding which extended the *SSA* rationale and determined

that a federal agency is actually precluded even from negotiating over a contract provision that would permit union-initiated midterm bargaining. The premise underlying the Fourth Circuit's trilogy of midterm bargaining decisions—that federal employers have no obligation, under any circumstances, to negotiate over union-initiated midterm proposals—cannot be sustained.

1. The union proposal at issue in this case is negotiable because, as the Statute's text and structure make clear, that proposal merely reflects the agency's statutory obligation to engage in midterm bargaining.

a. As this Court has recognized with regard to the Statute's scheme, an important goal of the FSLMRS was to create greater equality between labor and management. *See BATF*, 464 U.S. at 92. To that end, Congress created a statutory structure that establishes a broadly defined duty to bargain over working conditions—a duty that is subject only to express and narrow statutory exceptions. Thus, the Statute extends the duty to bargain to all "conditions of employment," a term expansively defined. 5 U.S.C. 7103(a)(14).

Examination of the pertinent statutory text provides abundant evidence that an agency is required under the Statute to bargain over union-initiated midterm proposals. The FSLMRS requires that labor and management bargain over conditions of employment for the purpose of achieving "collective bargaining agreements." 5 U.S.C. 7114(a)(1); *see also id.* at 7114(a)(4), (b)(1). It is the Statute's definition of "collective bargaining agreement" that answers the critical issue presented by this case.

The key term "collective bargaining agreement" is very broadly defined as any negotiated "agreement entered into as a result of collective bargaining." 5 U.S.C. 7103(a)(8). The definition contains *no* exception for midterm agreements and provides no statutory basis whatsoever for concluding that an agency's bargaining obligation is in any

way limited to negotiating only one "basic" agreement. The Statute, therefore, establishes that a midterm agreement is, by *definition*, a "collective bargaining agreement" and thus fully subject to the duty to negotiate. *See Pennsylvania Dep't of Corrections v. Yeskey*, 118 S. Ct. 1952, 1954 (1998) (*Yeskey*) (statutory coverage definition governs in absence of an explicit exception).

b. The Fourth Circuit's midterm bargaining analysis inappropriately relied on a fragment of legislative history from a Senate report that accompanied a bill that did not become law. The report language cited never addressed the obligation of an agency to bargain over union-initiated midterm proposals. In addition, as this Court has clearly instructed, no weight may be given to legislative history—particularly a "snippet of legislative history"—"that is in no way anchored in" or explained by "the text of the statute." *Shannon v. United States*, 512 U.S. 573, 583 (1994). Hence, it was entirely improper for the court of appeals to use a rejected Senate report to engraft onto the Statute an implied exception for bargaining over union-initiated midterm proposals.

c. The Fourth Circuit's position regarding union-initiated midterm bargaining not only fails to hew to the relevant text of the Statute, it also radically deviates—unjustifiably—from bedrock principles of applicable private sector labor law. From its inception, language in the National Labor Relations Act (NLRA) that is highly analogous to that in the FSLMRS has been construed as requiring an employer to bargain with a labor organization during the term of a collective agreement. In *NLRB v. Jacobs Manufacturing Co.*, 196 F.2d 680 (2d Cir. 1952) (*Jacobs*), the court of appeals held unequivocally that such a duty exists under the NLRA with regard to matters not waived by the union or covered by the parties' collective agreement. That determination—adopted by every court of appeals that has subsequently addressed the issue—is now "fully integrated into the fabric of labor

law." *NTEU*, 810 F.2d at 300. The Fourth Circuit's reasons for repudiating the *Jacobs* principle were entirely unpersuasive and largely based on the court's own policy views that union-initiated midterm bargaining is undesirable.

d. The Fourth Circuit further erroneously determined that union-initiated midterm bargaining would be at odds with the Statute's statement that the FSLMRS must be read in a way consistent with an "effective and efficient government." 5 U.S.C. 7101(b). The court of appeals' assumption that such bargaining inherently contributes to inefficiency flies in the face of Congress' explicit contrary determination that collective bargaining "contributes to the effective conduct of public business . . . ." *Id.* at 7101(a)(1). In making its decision about whether union-initiated midterm proposals are subject to the duty to bargain, the court engaged in a policy-based analysis that constituted an unauthorized usurpation of a policy decision made by Congress about the value of collective bargaining.

Moreover, experience under the Statute demonstrably belies the court of appeals' unwarranted claims that midterm bargaining would be inconsistent with an effective and efficient government. Indeed, both experience and the relevant case law demonstrate that the ability of labor organizations to make midterm proposals regarding vital workplace matters, such as with respect to health and safety issues, clearly *promotes* an effective and efficient government.

e. Finally, the Fourth Circuit's analysis conflicts with Congress' aim of "strengthen[ing] the position of federal unions . . . ." *BATF*, 464 U.S. at 107. Under the court of appeals' vision of federal sector labor relations, management would acquire a decisive upper hand and be empowered to require a union to bargain "over all lawful midterm proposals." *NTEU*, 810 F.2d at 301. The union, on the other hand, would be totally straitjacketed regarding any midterm initiatives of its own. Such a state

of affairs cannot be reconciled with Congress' goal of creating a more level playing field in federal labor relations.

2. In any event, even if the FSLMRS does not confer a right on labor organizations to initiate midterm bargaining, a union proposal, such as the one at issue in this case, that would authorize such negotiations is within the federal employer's obligation to bargain. Stated simply, a contractual provision requiring an agency to negotiate over union-initiated proposals does not fall within any of the exceptions to the Statute's broad duty to bargain. Indeed, this Court has recognized that a union may bargain for a right not conferred by the FSLMRS. In *BATF*, the Court stated that, although union negotiators were not entitled to travel and per diem payments under the Statute, "unions may presumably *negotiate* for such payments in collective bargaining . . . ." *BATF*, 464 U.S. at 107 n.17 (emphasis added). The same reasoning obtains here with regard to a union's ability to bargain for the right to make midterm proposals.

ARGUMENT

This Court has instructed that "[c]ollective bargaining is a continuing process," involving, among other things, the resolution of "new problems not covered by existing agreements . . . ." *Conley v. Gibson*, 355 U.S. 41, 46 (1957). Consistent with this view, Congress, in fashioning the Federal Service Labor-Management Relations Statute, created a flexible collective bargaining scheme and expressly recognized that collective bargaining is integral to the effective administration of the federal civil service. Congress explicitly made the key policy determinations that "statutory protection of the right of employees to organize, bargain collectively, and participate through organizations of their own choosing in decisions which affect them . . . safeguards the public interest," "contributes to the effective conduct of public business," and, moreover, "facilitates and encourages the amicable settlement of dis-

putes between employees and employers concerning conditions of employment." 5 U.S.C. 7101(a)(1).

The midterm bargaining analysis of the court below ignores the dynamic nature of collective bargaining and, more important, seriously conflicts with the fundamental policy choices Congress made in the FSLMRS. With reasoning that is striking in the degree to which it is infused with the court's policy views about collective bargaining, the Fourth Circuit has declared that any union-initiated midterm bargaining is unlawful. In the court's view, only management may initiate changes during the term of an agreement. Thus, if an unanticipated problem arises in the workplace—discovery of radon in a government building, for example—a federal sector union is powerless to respond by initiating a bargaining proposal on behalf of the employees whom the union is statutorily charged with representing. Indeed, the court of appeals has gone so far as to bar an agency employer even from negotiating about a contract provision authorizing union-initiated midterm bargaining.

The court of appeals' decision is deeply flawed in two respects. First, contrary to the holding of the Fourth Circuit, examination of the Statute, its scheme and the relevant case law establishes that federal employers are obligated to bargain over union-initiated midterm proposals. The bargaining proposal at issue here embodies that statutory obligation and thus is fully negotiable pursuant to the Statute. In any event, even if the FSLMRS does not confer a *right* on unions to initiate midterm bargaining, the union's proposal is at least negotiable: it is not inconsistent with the Statute or any other law or applicable regulations and thus does not fall within an exception to the FSLMRS's broad duty to bargain.

I. THE UNION'S PROPOSAL FALLS WITHIN THE DUTY TO BARGAIN BECAUSE THE TEXT, STRUCTURE AND POLICIES OF THE FSLMRS AND FUNDAMENTAL PRINCIPLES OF LABOR LAW ESTABLISH THAT FEDERAL EMPLOYERS ARE OBLIGATED TO NEGOTIATE OVER UNION-INITIATED MIDTERM PROPOSALS

A. The Text and Structure of the FSLMRS Establish That an Agency-Employer Bears an Obligation To Bargain over Union-Initiated Midterm Proposals

In determining that federal employer agencies have no obligation to negotiate over union-initiated midterm bargaining proposals, the Fourth Circuit in *SSA* reasoned that the Statute "seems to contemplate" that an employer's bargaining obligation extends to "only one, basic, agreement." 956 F.2d at 1284. That conclusion, however, cannot be squared with the FSLMRS's text and structure.

1. This Court has observed that in designing the Statute, "Congress unquestionably intended to strengthen the positions of federal unions . . . ." *BATF*, 464 U.S. at 107. Congress' firm commitment to promoting collective bargaining in the federal sector is made clear by the Statute's explicit finding that bargaining "safeguards the public interest" and "contributes to the effective conduct of public business." 5 U.S.C. 7101(a)(1)(A), (B). To effectuate these policy choices, Congress created a statutory framework that contains a broadly defined duty to bargain over conditions of employment—a duty that Congress made subject only to express and narrow statutory exceptions.[2]

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[2] *See Library of Congress v. FLRA*, 699 F.2d 1280, 1285 (D.C. Cir. 1983). Representative Udall, the drafter of the House-originated compromise bill that ultimately became law, described the management rights provision, for example, as something to be treated narrowly as an exception "to the general obligation to bargain." *Leg. Hist.* at 924. Thus, when Congress wanted to limit bargaining, it did so expressly. *See, e.g.*, 5 U.S.C. 7106, 7117.

Hence, the Statute extends the obligation to bargain to all "conditions of employment," a term expansively defined to include all personnel policies, practices, and matters affecting working conditions. 5 U.S.C. 7103(a)(14). To the extent Congress sought to limit the bargaining obligation, it did so by carving out specified subject areas. *See* 5 U.S.C. 7106(a), 7117(a). It is now well settled, moreover, that where an agency has discretion to act with respect to conditions of employment, it has an obligation to bargain over the exercise of that discretion. *See Department of the Treasury, United States Customs Serv. v. FLRA*, 836 F.2d 1381, 1384 (D.C. Cir. 1988).

2. Particularly when viewed against this backdrop of the statutory framework, it is evident the Statute's text establishes that the parties' duty to negotiate is ongoing through the life of a contract with respect to matters not covered by a master collective agreement or waived by the union. The Fourth Circuit maintained, however, that a "textual analysis is not definitive" on the issue of a federal sector union's right to initiate midterm bargaining. *SSA*, 956 F.2d at 1284. But as we now show, any fair reading of the pertinent statutory provisions yields the conclusion that the Statute, by its terms, sanctions such bargaining.

Analysis of the statutory text begins with the Statute's command that management and employee representatives meet in good faith to reach collective bargaining agreements. *See* 5 U.S.C. 7114(a)(1), (a)(4), (b)(1). The Statute's definition of "collective bargaining agreement" is especially instructive. The term very broadly refers to *any* negotiated agreement. It is simply defined as "an agreement entered into as a result of collective bargaining." 5 U.S.C. 7103(a)(8). Significantly, the definition of a "collective bargaining agreement" makes *no* exception for a midterm agreement and suggests no basis for relieving an employer of its obligation to bargain during the term of a "basic" collective agreement. Thus, the plain words of the Statute show that a midterm agreement—which is the

"result of collective bargaining"—is no less a "collective bargaining agreement" than a basic term agreement. It follows, therefore, that proposals advancing such midterm agreements are fully subject to the parties' duty to bargain. *See Yeskey*, 118 S. Ct. at 1954.[3]

Other pertinent provisions of the FSLMRS reinforce this conclusion. The text describing the duty to bargain in good faith, for instance, does not say that the parties shall meet to negotiate a contract and then not meet again. On the contrary, 5 U.S.C. 7114(b)(3) requires labor and management to "meet at reasonable times and convenient places as frequently as may be necessary . . . ."

The Statute's definition of "collective bargaining" further shows that an employer's obligation to bargain extends beyond the negotiation of one term agreement. That definition prescribes—again without any words of temporal limitation—that both labor and management have a "*mutual* obligation" to "meet at reasonable times" in order to reach agreement regarding conditions of employment. 5 U.S.C. 7103(a)(12) (emphasis added). Also relevant is the language of 5 U.S.C. 7114(a)(1), which imposes on labor and management the obligation to meet in good faith to reach "collective bargaining agreement*s*." The

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[3] There, this Court held that where the Americans with Disabilities Act's broad definition of "public entity" contained no exception for state prisons, the statute's "language unmistakably include[d]" such institutions. The same reasoning applies to the instant case. Where the FSLMRS's definition of "collective bargaining agreement" is "*without* any exception" for midterm agreements, those agreements are covered by the Statute's bargaining obligation. *Id.* (emphasis in the original).

Indeed, as the D.C. Circuit has indicated, where Congress wanted to distinguish between different types of agreements, it did so in clear terms. *American Fed'n of Gov't Employees v. FLRA*, 750 F.2d 143, 147 (1984) (*AFGE v. FLRA*). Hence, 5 U.S.C. 7114(c)(4) of the Statute describes procedures for the approval of "local" agreements.

use of the plural "agreements" additionally signals that Congress intended the bargaining of more than "one, basic agreement." *SSA*, 956 F.2d at 1284.[4]

Two courts of appeals have analyzed the statutory definition of "collective bargaining agreement" and have underscored its breadth, rejecting a claimed distinction between basic and midterm agreements in one case and basic and local agreements in the other. In both cases, the issue was whether the statutory provisions for official time "in the negotiation of a collective bargaining agreement" (5 U.S.C. 7131(a)) extended beyond negotiation of a basic agreement. In *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 672 F.2d 732, 736-37 (9th Cir. 1982), *rev'd in part on other grounds*, 464 U.S. 89 (1983), the court found that "[t]he statute's application cannot be limited to the negotiation of basic agreements" and, instead, encompassed midterm agreements, as well. In *American Federation of Government Employees v. FLRA*, 750 F.2d 143 (D.C. Cir. 1984), the D.C. Circuit stressed that neither the broad statutory definition of "collective bargaining" nor any of the other "relevant definitional sections of the Act" make any distinctions between basic collective agreements and local agreements. *Id.* at 146. The same reason-

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[4] The Fourth Circuit placed great weight on the Statute's use, at several points, of the word "agreement" in the singular. *See SSA*, 956 F.2d at 1284. But the court was quick to dismiss as an inconsequential "generic" statement, the inconvenient fact that Congress also used the plural "agreements" in 5 U.S.C. 7114(a)(1). *See id.* at 1284 n.1. The court's glib inference is entirely unjustified given the Statute's broadly defined duty to bargain—a duty that, as shown, is subject only to express exceptions. In any event, even if Congress had only used the singular word "agreement," the court of appeals' analysis would remain unconvincing: as shown *supra*, a midterm agreement *is* a "collective bargaining agreement" and thus is subject to the Statute's duty to bargain. *See also* discussion (*infra* at 21-22) of the well-settled private sector obligation to engage in midterm bargaining notwithstanding the NLRA's use of the singular term "agreement."

ing obtains here: in defining the parties' bargaining obligation, the Statute does not distinguish between basic term agreements and midterm agreements, and no distinction should be inferred as the Fourth Circuit erroneously did in *SSA*.[5]

In sum, the text and structure of the FSLMRS demonstrate that, contrary to the Fourth Circuit's holding in *SSA*, the Statute requires that a federal agency-employer bargain over midterm proposals advanced by its employees' exclusive representative as to matters not covered by an existing agreement or waived by the union. To find, as the Fourth Circuit did, an implied exception to the duty to bargain for union-initiated midterm proposals is wholly unwarranted. Such an inference is particularly inappropriate given Congress' design that the Statute's duty to bargain be subject only to express exceptions. Here, Congress wrote no such exception regarding a union's midterm proposals—something it could easily have done if it so desired.

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[5] The court of appeals was simply wrong when it stated that 5 U.S.C. 7106(b)(2) and (3) prescribe the only circumstances when management has an obligation to engage in midterm bargaining. *See SSA*, 956 F.2d at 1284. Congress wrote those subsections to impose limitations on the exercise of the management rights described in 5 U.S.C. 7106(a). But it is also clearly established that management's duty to negotiate is not limited to proposed midterm changes concerning exercise of its management rights; it must bargain *any* time it wishes to change conditions of employment during a contract's term. *See, e.g., United States Dep't of Labor, Washington, D.C. and American Fed'n of Gov't Employees, Local 12*, 44 F.L.R.A. 988, 988-89, 994-95 (1992) (agency had obligation to bargain about the substance of its decision to change parking fees and parking procedures).

Moreover, the Fourth Circuit's reliance on section 7106(b) is misplaced because there is absolutely no indication that Congress intended that section to address the timing of the parties' duty to bargain.

B. The Fourth Circuit's Heavy Reliance on a Fragment of Legislative History Was Inappropriate

The Fourth Circuit's analysis of midterm bargaining was gravely flawed by its heavy and inappropriate reliance on an elliptical excerpt from a Senate report that accompanied a version of the FSLMRS that never became law. *See SSA*, 956 F.2d at 1284-85. The passage cited stated that, under the proposed Senate bill, labor and management must bargain, not only about management-instigated changes in "established personnel policies" but also about "proposals initiated by either the agency or the exclusive representative in the context of negotiations leading to a basic collective bargaining agreement." S. Rep. No. 969, 95th Cong., 2d Sess. 104, *reprinted in Leg. Hist.* at 764. As the *NTEU* court correctly determined, this "fragment" of legislative history does not aid the Fourth Circuit's position regarding midterm bargaining. *See* 810 F.2d at 299.

First, as the D.C. Circuit pointed out (*see id.*), the cited language in the Senate report never addressed the pivotal question of whether management must bargain over a union's midterm proposal. Even if an intent to do so could be inferred from the report, reliance on it as an expression of the will of *Congress* would be totally improper. As this Court has emphatically declared, no "authoritative weight" may be given to a passage of legislative history, such as the one in question here, "that is in no way anchored in" or explained by "the text of the statute." *Shannon*, 512 U.S. at 583. *Accord United States v. Gonzalez*, 117 S. Ct. 1032, 1036 (1997). Indeed, to give any weight to the "snippet of legislative history" (*Shannon*, 512 U.S. at 583) relied on by the court below would be especially erroneous because both houses of Congress ultimately rejected the Senate bill described by the committee report and instead passed a House-sponsored bill drafted by Representative Udall. *See National Treasury Employees Union v. FLRA*, 691 F.2d 553, 559 (D.C. Cir. 1982) (*NTEU v. FLRA*). Significantly, neither the

FSLMRS nor the Conference Report describing the final version of the Statute embraced by Congress contains any explanatory language like that found in the report accompanying the discarded Senate bill. *See* H.R. Rep. No. 95-1717, 95th Cong., 2d Sess., *reprinted in Leg. Hist.* at 793.

Further demonstrating that reliance on the Senate report was inappropriate is the fact that, as the *NTEU* court stressed, the very section of the report relied on by the Fourth Circuit embodies a view of the obligation to bargain that was clearly rejected in the final version of the Statute. *See* 810 F.2d at 298-99. That section stated that the "scope of negotiations under this section is the same as under section 11(a) of Executive Order 11491" (which, as noted, governed federal sector labor relations before enactment of the Statute). *Leg. Hist.* at 764.[6] But the FSLMRS, as enacted, reflected a clear rejection of the prior collective bargaining system that the Senate bill would have perpetuated. As the *NTEU* court observed, the "adoption of the House version of the legislation represents a repudiation of the narrow view of collective bargaining that would have been codified by the Senate bill." 810 F.2d at 299 (citing *NTEU v. FLRA*, 691 F.2d at 559-61). The scope of bargaining of the final version of the Statute differed substantially from the Executive Order regime. For instance, the Statute's management rights provision (5 U.S.C. 7106) omitted the catch-all right found in the Executive Order "to maintain the efficiency of government operations." Exec. Order No. 11491, Sec. 12(b)(4), *reprinted in Leg. Hist.* at 1346.

As Representative Clay, a key author of the Statute stressed, the enacted Udall compromise contained a significantly more expansive obligation to bargain than existed under the supplanted Executive Order. *Leg. Hist.* at 932

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[6] *Compare* S. 2640, 95th Cong., 2d Sess., *reprinted in Leg. Hist.* at 550, 589-90, *with* Exec. Order No. 11491, as amended, *reprinted in Leg. Hist.* at 1342, 1346.

(remarks of Rep. Clay). Representative Clay underscored a prevailing extreme dissatisfaction with decisions of the Federal Labor Relations Council—the FLRA's Executive Order predecessor—which had too often broadly construed the Order's management rights section. *See Leg. Hist.* at 934 (the "whole structure and approach of Title VII is in large part a repudiation of past Council practice"). Representative Ford, another principal author of the Statute and manager of the Udall bill, echoed that description of the Statute's design. *See Leg. Hist.* at 953-54 (remarks of Rep. Ford); *NTEU v. FLRA*, 691 F.2d at 559 n.62; *see also American Fed'n of Gov't Employees v. FLRA*, 702 F.2d 1183, 1187 (D.C. Cir. 1983); *Federal/Postal/Retiree Coalition v. Devine*, 751 F.2d 1424, 1429 n.9 (D.C. Cir. 1985) (describing key legislative roles of Representatives Clay and Ford).

In adhering to its dubious reliance on the Senate report, the Fourth Circuit unpersuasively sought to explain away the significant divergence in the approach to bargaining taken by the Senate and House versions: it argued that those differences were inapposite because they focused on subjects for negotiations rather than the timing of bargaining. But the court of appeals' contention misses the point. As shown, the final House version of the Statute reveals a much broader view of management's obligation to bargain than that contained in the rejected Senate bill. Given this materially different orientation regarding the duty to negotiate, it would be utterly incongruous to infer that Congress silently adopted a limitation to a union's ability to initiate midterm bargaining proposals. Surely, if Congress had intended the language of the rejected Senate report relied on by the Fourth Circuit to establish such an important bar, it is reasonable to believe that it would have said so either in the Statute itself or in the Conference Report.[7] *See Shannon*, 512 U.S. at 583.

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[7] In reaching its conclusion about union-initiated midterm bargaining, the Fourth Circuit also erroneously claimed that such

C. The Fourth Circuit's Position on Midterm Bargaining Radically Deviates from Well-Settled Applicable Private Sector Labor Law Principles

Fundamental precepts of private sector labor law also establish the error of the Fourth Circuit's view of midterm bargaining. As this Court and the *NTEU* court have indicated, Congress patterned the Statute to a significant degree after the National Labor Relations Act (NLRA), 29 U.S.C. 151-168. *See BATF*, 464 U.S. at 92-93; *NTEU*, 810 F.2d at 299. It is now commonplace for the FLRA and reviewing circuit courts to look to private sector case law for guidance when appropriate. *See NTEU*, 810 F.2d at 299; *Library of Congress*, 699 F.2d at 1286.

The private sector law has historically recognized the existence of a general duty to bargain over union-initiated midterm proposals. From its inception, the NLRA has been viewed as establishing an employer's duty to bargain with its employee representative during the term of a collective bargaining agreement.[8] Significant for the issue

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bargaining had been proscribed under the regime of the Executive Order. *See SSA*, 956 F.2d at 1285-86. Our research of Executive Order precedent reveals no definitive resolution of union-initiated midterm bargaining. *See Army & Air Force Exchange Serv.*, 5 F.L.R.C. 167 (1977) (clarifying that the administrative decision under review did not turn on the agency's claim that it had no obligation to bargain midterm regarding a union proposal). Indeed, a respected treatise on federal sector labor relations states that under the Executive Order both labor and management had a continuing duty to bargain through the term of a collective agreement. *See* H. Robinson, *Negotiability in the Federal Sector*, 10-11 and n.9 (1981). *See, e.g., National Fed'n of Fed'l Employees v. FLRA*, 681 F.2d 886, 893 (D.C. Cir. 1982); *FLRA v. Office of Personnel Management*, 778 F.2d 844, 845 n.2 (D.C. Cir. 1985) (citing treatise).

[8] *See NLRB v. Jacobs Mfg. Co.*, 196 F.2d 680, 683 (2d Cir. 1952); *see also* P. Hardin, *The Developing Labor Law*, at 699 n.741 (1992) (citing *NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1939)) (under the original NLRA, "an employer was under a duty, upon request, to

presented here, the pertinent language of the NLRA parallels the FSLMRS. Specifically, the NLRA stipulates that it is the "mutual obligation" of the parties to "meet at reasonable times and confer in good faith" for the purpose of "negotiation of an agreement" concerning "terms and conditions of employment." 29 U.S.C. 158(d).

In *Jacobs*, 196 F.2d at 680, the Second Circuit rejected the employer's contention that a then-recently added exception to the NLRA's bargaining obligation relieved the company of its duty to engage in midterm negotiations regarding a union's proposals. As amended, the NLRA provides in section 8(d), 29 U.S.C. 158(d), that there is no requirement to engage in midterm bargaining over matters "contained in" the collective bargaining agreement. The company in *Jacobs* claimed that this exception to the duty to bargain created a "static relationship" between the employer and its employees for the duration of a term agreement. 196 F.2d at 684.

Dismissing the employer's position, the court of appeals stressed that the NLRA was intended to encourage peaceful resolution of labor disputes through collective bargaining. Given the narrow nature of the exception to bargaining prescribed by section 8(d), the court concluded that it could not be read to shield the employer from its duty to negotiate as to "subjects which were neither discussed nor embodied in any of the terms and conditions of the contract." 196 F.2d at 684.[9]

The principle now enshrined in *Jacobs* and its progeny —that employers have an obligation to bargain midterm over matters not covered by an agreement of the parties—

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bargain with the union as to terms and conditions of employment whether or not the subject had been discussed and previously embodied in a collective bargaining agreement").

[9] As the *NTEU* court observed (*see* 810 F.2d at 300), the holding in *Jacobs* is now fully integrated into the fabric of labor law. *See, e.g., NL Indus., Inc. v. NLRB*, 536 F.2d 786 (8th Cir. 1976); *Mead Corp. v. NLRB*, 697 F.2d 1013 (11th Cir. 1983).

is grounded in an objective shared by both the FSLMRS and the NLRA: promoting collective bargaining as the critical means of achieving the "amicable settlement" of labor disputes. *See* 5 U.S.C. 7101(a)(1); *Jacobs*, 196 F.2d at 684. The principle fits especially well within the FSLMRS's scheme, given its presumption in favor of bargaining absent an expressly stated exception.

Paradoxically, the Fourth Circuit found it significant that the FSLMRS does not include a *limitation* on midterm bargaining comparable to section 8(d) of the NLRA. *See SSA*, 956 F.2d at 1287 (citing 29 U.S.C. 158(d)). The absence of a provision similar to section 8(d) is of no consequence. The corollary of the *Jacobs* principle—that the duty to engage in midterm bargaining regarding union-initiated proposals does not extend to matters contained in or covered by the parties' collective agreement—is such a fundamental labor law principle that it is not at all surprising that Congress did not spell it out in the FSLMRS.[10] Indeed, the Fourth Circuit's counter-intuitive notion—that the absence of an explicit bargaining exception in the Statute to parallel section 8(d) demonstrates an intent to deny a right to bargain "in the first place" (956 F.2d at 1287)—turns the FSLMRS's presumption in favor of bargaining on its head.

D. The Fourth Circuit's Policy-Based Views of Midterm Bargaining Flout Congress' Policy Judgment That Collective Bargaining Promotes an Effective and Efficient Government

The Fourth Circuit's view that union-initiated midterm bargaining was inconsistent with the Statute's goal of ensuring an "effective and efficient government" prompted it to reject any analogy to the *Jacobs* private sector prin-

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[10] The FLRA's case law reveals the well-established nature of the "covered by" principle. *See, e.g., United States Dep't of Health and Human Serv. and American Fed'n of Gov't Employees*, 47 F.L.R.A. 1004 (1993) (*HHS*); *Internal Rev. Serv. and National Treasury Employees Union*, 29 F.L.R.A. 162 (1987).

ciple and to conclude, moreover, that the FSLMRS did not authorize such bargaining. Specifically, the court below predicted that, given the availability of the Federal Service Impasses Panel (FSIP or Panel), "many more midterm negotiations would be expected in the public sector than the private sector." *SSA*, 956 F.2d at 1287. The court further speculated that a union option to engage in midterm bargaining would discourage the parties from foreseeing potential issues. In addition, the court theorized that the impasse resolution role of the FSIP would encourage unions to negotiate and arbitrate issues "seriatim rather than as a unified package," which would allegedly result in the "dispersal" of the bargaining process and, according to the court, undermine stable labor-management relationships. *Id.* at 1287-88. As we show, the court's analysis was unsound for an array of reasons.

1. First, in making these naked policy assessments, the court's opinion betrayed an untenable hostility to collective bargaining that collides with the explicitly stated policies of the FSLMRS. The court seized on 5 U.S.C. 7101(b)'s reference to an "effective and efficient government" and treated it as a kind of catch-all management right that can be invoked to override any bargaining proposal that the agency finds objectionable.[11] Such an approach fails to honor Congress' plan that the Statute's

[11] The court's apparent belief that permitting a union to make midterm proposals would lead to "continuous bargaining" does not come to grips with the realities of the collective bargaining process. Management need not always negotiate with a union during the term of the agreement. For example, the parties could agree to a "zipper clause" that would serve as the union's waiver of its right to initiate midterm proposals. *See, e.g., FLRA v. Internal Rev. Serv.*, 838 F.2d 567 (D.C. Cir. 1988) (per curiam) (Edwards, J., concurring) (explaining the availability of such clauses in the federal sector). Nor would management have to bargain over matters "covered by" the parties' term agreement. Contrary to the Fourth Circuit's wholly erroneous and dated suggestion in *SSA* (956 F.2d at 1289), the "covered by" doctrine is an integral element of the federal sector labor relations scheme. *See, e.g., HHS*, 47 F.L.R.A. at 1004.

broad duty to bargain be subject only to express and narrow exceptions. The court's rationale, moreover, elevates the Statute's "effective and efficient government" clause to the status of a super management right that would permit agencies to eschew bargaining whenever they deemed it to be inconvenient. Such an elastic "inconvenience" standard is the last thing Congress had in mind when it wrote the Statute. Indeed, as noted *supra* at 19, Congress deliberately rejected a Senate proposal to carry over from the Executive Order regime a sweeping "efficiency of government" management right. *See American Fed'n of Gov't Employees v. FLRA*, 785 F.2d 333, 336-38 (D.C. Cir. 1986) (in the FSLMRS, Congress did not establish a "collective bargaining system in which the duty to bargain exists only at the agency's convenience . . .").

Most important, the Fourth Circuit's *SSA* analysis flouted the express policy judgment of Congress that collective bargaining is something to be *encouraged* precisely because it *promotes* an effective and efficient government. *See* 5 U.S.C. 7101(a)(1)(B). Further, in making its naked policy judgments about midterm bargaining, the court strayed far from its proper role in reviewing the decision of an administrative agency such as the FLRA. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).[12]

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[12] The court of appeals dismissed section 7101(a)(1)(B)'s goal of promoting collective bargaining as a virtually meaningless generality; the court claimed that because there are statutory exceptions to the duty to bargain, Congress did not believe that collective bargaining advanced the public interest in all circumstances. *See SSA*, 956 F.2d at 1280. The court's comment fails to discern the salient point that, as shown, where Congress wished to preclude bargaining it did so expressly; to infer an implied exception for union-initiated midterm bargaining cannot be squared with the text of the FSLMRS or the presumption in favor of bargaining established by the Statute's scheme.

Moreover, as the *NTEU* court correctly observed, where Congress intended that management's prerogatives be preserved, it

2. In any event, experience has now decisively demonstrated that the Fourth Circuit's dire predictions about the adverse impact midterm bargaining would have on federal sector labor relations were much ado about nothing. For example, the court below hypothesized that because, in the federal sector, the FSIP is available to resolve impasses over union-initiated midterm proposals, a disruptive flood of "seriatim FSIP arbitration" would follow. *SSA*, 956 F.2d at 1288. Examination of the decisions of the Panel flatly belies that assertion. The D.C. Circuit's *NTEU* midterm bargaining holding has been the rule everywhere but in the Fourth Circuit for more than 10 years. Our research shows that during that time Panel arbitrations regarding union-initiated midterm proposals have been rare.[13]

We are, further, aware of no claim, far less any showing, that unions have in fact used midterm bargaining in the manipulative way predicted by the Fourth Circuit in its *SSA* ruling. In none of the midterm bargaining cases that federal agencies have litigated in the courts of appeals is there any evidence of abuse by unions. This is hardly surprising: the federal sector experience is entirely consistent with that in the private sector. The Eighth Circuit, in endorsing the *Jacobs* rule, stressed that a mutual right to engage in midterm bargaining has the salutary effect of enhancing stability by providing the parties "flexibility" to

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did so through section 7106's "comprehensive system of subject matter protection, rather than through implied restrictions . . . ." *NTEU*, 810 F.2d at 301.

[13] *See Department of Transp., Federal Aviation Admin. and Local R3-10, National Ass'n of Gov't Employees*, 96 F.S.I.P. 146 (1997); *United States Int'l Trade Comm'n and Local 2211, AFGE*, 91 F.S.I.P. 205 (1992); *Department of the Treasury, Internal Rev. Serv. and NTEU*, 91 F.S.I.P. 229 (1992); *Department of the Treasury, Internal Rev. Serv. and NTEU*, 91 F.S.I.P. 45 (1992); *Departments of the Army & Air Force and Local 4042, AFGE*, 90 F.S.I.P. 191 (1991); *United States Fed. Trade Comm'n and Local 2211, AFGE*, 90 F.S.I.P. 86 (1990).

deal with such "future contingencies" as changing economics, technology and working conditions. *NL Industries*, 536 F.2d at 790 n.5.

3. The Fourth Circuit's extended policy analysis of midterm bargaining is seriously defective because it refuses to accept that union-initiated midterm bargaining can clearly enhance the public interest in an effective and efficient government. The Eighth Circuit in *NL Industries* appreciated what *SSA* did not: that sometimes it is not possible to "foresee potential" issues (*SSA*, 956 F.2d at 1288) and that midterm bargaining is an effective means to address those matters.

Midterm negotiations permit labor and management to address unanticipated matters, such as the discovery of life-threatening health hazards in the workplace in the form of radon, asbestos, or outbreaks of Legionnaire's disease. Midterm negotiations also permit the parties to respond to new legislation or new executive branch directives aimed at furthering the public's interest in good government. To illustrate, in April 1998, the President issued a directive to federal agencies, instructing them to examine their leave policies for the purpose of allowing employees to take some time off to perform community service. Federal employee representatives share the President's belief that the federal government "has a responsibility to set an example by helping to make it possible for its employees to dedicate time to serve others." President's Memorandum on Citizen Service, 34 Weekly Comp. Pres. Doc. 691 (Apr. 22, 1998). It would clearly advance the public interest in carrying out that worthy goal if a labor organization could initiate midterm proposals to facilitate employee participation in community service.

To maintain, as the *SSA* court did, that issues arising midterm can be deferred until the negotiation of the next term agreement reveals a failure to apprehend that some matters simply cannot wait to be addressed, and others

should not wait. And, as our examples suggest, it is hard to fathom how leaving employees powerless to bargain for workplace protections or to respond to new directives can be reconciled with Congress' objective of an effective and efficient government.

Ironically, the Fourth Circuit's policy-based aversion to union-initiated midterm bargaining actually undermines the kind of effective and efficient government the court purported to be promoting. If unions are precluded from midterm initiatives, they will be forced to resort to a "kitchen sink" approach to term agreements; they will have no choice but to try to include in the agreement all matters that might conceivably arise during the contract's term. Such contingency bargaining would only serve to increase, unnecessarily, areas of conflict at the bargaining table and greatly impede the parties' ability to reach a term agreement. In addition, barring union-initiated midterm proposals would remove a critical escape valve for workplace tensions that may develop during the term of the agreement.[14] The loss of productivity that accompanies such pent-up tensions hardly facilitates Congress' important goal of ensuring an effective and efficient government.

4. Finally, the Fourth Circuit's policy-based analysis of union-initiated midterm bargaining contravenes Congress' clear goal of creating greater equality between "labor and management at the bargaining table." *AFGE v. FLRA*, 750 F.2d at 148. That the court of appeals gave short-shrift to this policy goal is starkly revealed by the underlying premise of its midterm bargaining stance: only union-initiated adjustments—but not management-instigated changes—are the source of instability in the workplace. But, as the D.C. Circuit correctly discerned, the premise of the court below is untenable: if there were

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[14] *See, e.g., Library of Congress*, 699 F.2d at 1289-90 (recognizing that barring negotiations over working conditions breeds "frustration" and "disharmony" among employees).

instability, it would be equally created by *management*-initiated midterm proposals. *See NTEU*, 810 F.2d at 300.

Most important, the Fourth Circuit's conception of midterm bargaining would greatly distort the parties' bargaining relationship. If the position of the court below were to prevail, management would have no obligation to bargain over union-initiated midterm proposals, but employee representatives would have to "bargain over all lawful midterm proposals *by management*, not only those required by law or within the statute's explicit management rights." *NTEU*, 810 F.2d at 301 (emphasis in original). Such a distorted scheme of collective bargaining is flatly at odds with what Congress had in mind when it designed the FSLMRS in a way that was "unquestionably intended to strengthen the position of federal unions . . . ." *BATF*, 464 U.S. at 107.

In short, as the foregoing has established, the Fourth Circuit's policy-based analysis of midterm bargaining collides with Congress' own contrary policy judgments. Nor can the court's characterizations of midterm bargaining be squared with relevant experience in the private and public sectors.[15]

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[15] The Fourth Circuit did not begin to give the FLRA the deference it is due under *Chevron*, 467 U.S. at 837. As we have explained, a textual analysis of the relevant statutory provisions shows that agencies bear an obligation to bargain over a union's midterm proposals. Even if the text is somehow viewed as not definitive, it amply establishes the reasonableness of the Authority's determination regarding midterm bargaining. The Fourth Circuit did not credibly demonstrate that Congress "directly spoke[]" (*Chevron*, 467 U.S. at 842) to the midterm issue in the way argued by the court of appeals; nor did the court show that the FLRA's rationale was an impermissible construction of the Statute.

II. IN ANY EVENT, EVEN IF THE FSLMRS DOES NOT REQUIRE MIDTERM BARGAINING, A CONTRACT PROPOSAL AUTHORIZING UNION-INITIATED MIDTERM BARGAINING IS WITHIN THE STATUTORY OBLIGATION TO BARGAIN

Even assuming that the FSLMRS does not confer a *right* on labor organizations to initiate midterm bargaining, a union proposal—such as the one at issue in this case—that would authorize such negotiations is within the federal employer's obligation to bargain. In other words, the Statute does not, contrary to the holding of the court below, bar unions from attempting to *negotiate* for the right to engage in union-initiated midterm bargaining.

This conclusion is firmly supported by the text and structure of the Statute. As explained *supra*, under the FSLMRS, the obligation to bargain extends to all proposals concerning conditions of employment unless they either contravene a management right or are inconsistent with law, government-wide regulations, or agency regulations for which a compelling need exists. *See* 5 U.S.C. 7106, 7117(a). Simply stated, a contractual provision obligating an agency to negotiate over union-initiated proposals does not fall within any of these exceptions and, therefore, is a mandatory subject of bargaining.

Our position that a union can bargain for a right that is not conferred by the Statute is buttressed by this Court's decision in *BATF*. In that case, the Court instructed that, although union negotiators were not entitled to receive travel and per diem payments under the FSLMRS, "unions may presumably negotiate for such payments through collective bargaining." *Id.* at 107 n.17. The D.C. Circuit subsequently followed that instruction and agreed with the FLRA and NTEU that a contract proposal for travel and per diem payments fell within the duty to bargain because it did not conflict with applicable law or regulation. *National Treasury Employees Union and Department of*

the Treasury, 21 F.L.R.A. 6 (1986), *enforced*, 836 F.2d 1381 (D.C. Cir. 1988). The analogy furnished by this Court's *BATF* opinion fully applies here.

In its *DOE* decision, the Fourth Circuit determined that a contract clause providing for union-initiated midterm bargaining was not negotiable because such midterm bargaining was "inconsistent" with the Statute. 106 F.3d at 1164. That ruling was plainly erroneous. First, the court of appeals never identified any law or regulation that would preclude negotiating over a proposal seeking the right to midterm bargaining. Instead, the court pointed to 5 U.S.C. 7101(b) and grounded its decision on the court's view of what constitutes an "effective and efficient government." As discussed above, the Statute's reference to an "effective and efficient government" is not a catch-all standard for adjudging whether a matter falls within the duty to bargain. Hence, the Fourth Circuit's objections to the adoption of a proposal like that advanced by the Union in this case go to the merits of the proposal, not whether the proposal is negotiable as a matter of law.

Moreover, as also shown above, the court of appeals' "effective and efficient" government analysis does not withstand examination. The extreme stance of the court below would bar an agency from negotiating over—much less agreeing to—a contract provision authorizing union-initiated midterm bargaining even when the agency wanted to do so. There are, as indicated, frequent situations where a contract proposal sanctioning union-initiated midterm bargaining would foster management's interest in flexibility. During term negotiations management may wish to change conditions of employment; it may, for instance, be interested in an experimental trial period of modified starting and quitting times. The union might well be amenable to considering the change if it believed that it would have a chance to make a midterm proposal —perhaps at a defined and mutually agreed upon time— modifying the arrangement. Without that option, however,

the employees' representative may be unable to convince its constituency to agree to the change. In short, management's interest in experimenting as to conditions of employment would be thwarted by the Fourth Circuit's rigid view of midterm bargaining—a result that would hardly serve an "effective and efficient" government.

To summarize, even if there is no statutory duty to negotiate over a union's midterm proposals, a contract provision authorizing such bargaining is within the Statute's obligation to bargain because it is not inconsistent with any applicable law. Endorsement of the skewed collective bargaining regime prescribed by the Fourth Circuit would hobble the role of employees' collective bargaining representatives in a way that cannot be squared with the FSLMRS's fundamental goal of creating greater equality between labor and management. *See BATF*, 464 U.S. at 92.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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